Supreme Court of the United States

OCTOBER TERM, 1920

No. 290

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR C. LANG, Deceased, *Plaintiff-in-error*,

versus

NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-in-error.*

BRIEF FOR PLAINTIFF-IN-ERROR

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TABLE OF CASES

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Defendant-in-error.

Brief for Plaintiff-in-Error

STATEMENT.

Writ of certiorari to the Supreme Court of the State of New York (fols. 121-124) to review a judgment of the Court of Appeals, the highest court of said state, made the judgment of said Supreme Court (fols. 114-118, entered on the 19th day of January, 1920 (fols. 116-118), reversing a judgment of the Appellate Division of said Supreme Court (fols. 101-103) which affirmed a judgment of the trial term of said court (fols. 14-10) and an order of the trial court denying defendant's motion for a new trial on the minutes (fols. 16, 17), entered on a verdict of a jury in favor of plaintiff-

in-error, plaintiff at the trial, against defendant-in-error, defendant at the trial, for the sum of $18,000.00, apportioned as follows:

To Anna E. Lang, widow of intestate....$7000.00
To Raymond J. Lang, son of intestate.... 2500.00
To Dorothy M. Lang, daughter of inestate 4000.00
To John A. Lang, son of intestate..... 4500.00
(fols. 19, 20, 90).

The opinion of Hon. Charles B. Wheeler, the judge before whom, with a jury, the case was tried, denying defendant's motion for a new trial on the minutes is printed at pages 64-68 of the record.

No opinion was handed down on the affirmance of said judgment and order by said Appellate Division.

The opinion of the Court of Appeals of the State of New York by Andrews, J., upon reversal of said judgment and dismissal of the complaint is printed on pages 72, 73 of the record.

PLEADINGS

COMPLAINT.

It appears by the complaint that the defendant, the New York Central Railroad Company, is a domestic railroad corporation and was, during the times mentioned in said complaint, engaged in the

business of operating a steam service railroad in and through various states, including New York, Pennsylvania and Ohio, and was engaged in interstate commerce (fol. 5). That on November 1, 1917, Oscar G. Lang, plaintiff's intestate, was engaged in his work, as employee of defendant at Silver Creek, New York (fol. 5), in interstate commerce and was killed by reason of the violation by said defendant of the Federal Safety Appliance Act. fols. 6-8).

ANSWER

The answer of defendant admits the corporate existence and status of defendant and that it was at the times mentioned engaged in interstate commerce (fols. 9,5). Then denies knowledge or information sufficient to form a belief as to the other allegations of the complaint excepting that it admits on November 1st, 1917, said Oscar C. Lang was in the employ of defendant as a freight brakeman and met with an accident at Silver Creek, New York, sustaining injuries from which he died, and also that both he and the defendant were, at the time, engaged in interstate commerce (fol. 9).

Then said answer alleges that said injuries occurred by reason of the negligence of said intestate and that said intestate assumed the risk (fols. 9, 10).

Trial and Subsequent Proceedings

The action was brought to trial before Hon. Charles B. Wheeler, Justice of the Supreme Court of the State of New York, and a jury in Erie County, New York, on June 6, 1918 (fol. 21), resulting in the verdict aforementioned (fols. 19, 20, 90).

Under the state practice a motion was then made to the trial court on the minutes by defendant for a new trial which was denied (fols. 16, 17), and the judgment on said verdict was duly entered June 13, 1918 (fols. 14, 15).

From this judgment and order defendant appealed to said Appellate Division (fols. 2, 3), which on March 5, 1919, affirmed said order and judgment (fols. 100-103).

From this judgment defendant appealed to said Court of Appeals by which the judgments of the courts below were reversed and the complaint of plaintiff dismissed, finally determining and ending the action, except for the right of review in this court, two of the judges of said court dissenting (fols. 111-113).

Under the state practice the rimittitur containing the order for such reversal was sent down to the Supreme Court, which, by order, made the judgment of said Court of Appeals the judgment of the Supreme Court of said state (fols. 114,115). A judgment to that effect was entered (fols. 116, 117).

Plaintiff then made due application to this court for a writ of certiorari to review said final judgment, which writ was granted by this court at the October, 1918, term, and filed May 22nd, 1920 (fols. 121-124).

FACTS

The facts are not in dispute.

It is conceded that defendant and intestate were both engaged in interstate commerce at the time of the accident resulting in the intestate's death (fol. 9).

Intestate was at the time, November 1, 1917, acting as a brakeman on a way freight train running east from Erie in the state of Pennsylvania to the city of Buffalo in the state of New York, and was killed by being crushed between two cars because one of them was defective in that the automatic coupler was broken (fol. 31).

At Silver Creek, an intermediate station, there was a car standing on the siding destined for Farnham, the next station east, which was to be taken from the siding and attached to said train at Silver Creek and carried to Farnham, its destination. Standing with it on the siding at Silver Creek was a box car which had arrived there two weeks before loaded with steel consigned to the Hunter Manufacturing Company of Silver Creek. It was then

in process of being unloaded but not yet completely unloaded. It was in good condition when it reached its destination at Silver Creek two weeks before and had been moved about on the sidings there while in the process of being unloaded and also for the purpose of moving cars on and off the siding and taking them on and off trains as they passed that station, and some time during said two weeks, and previous to the time of the accident, it became out of order in thus being shifted about, the automatic coupler thereon being broken and defective (fols. 34-37, record).

The defective condition of the car and that such defect constituted a violation of the Safety Appliance Act are not disputed.

Defendant had been unable to complete the unloading, and the car was on the siding and being thus shifted about while the unloading was proceeding (fols. 41, 42).

The crew to which intestate belonged operating the way freight train in getting the car intended for Farnham had to move the defective car and shift it about for that purpose, or else adopt another method of getting it out, which they did, but which was made necessary and controlled by the presence, position and defective condition of the out of order car.

A material and distinguishing fact here is that this defective car, so defective in violation of the

Safety Appliance Act, *was in use by defendant and also by the crew of which intestate was a member.* The unloading of it had not been completed (fols. 38-42), the cargo not yet delivered. It was necessary to shift it about on the siding back and forth whenever a movement such as intestate was engaged in became necessary (fols. 38-42, 48-51).

So, it is seen that *defendant was using this defective car;* that it had not been laid up for repairs, nor was it standing on the track or siding where it stood on the day of the accident because it had been taken out of use or laid up for repairs, but it was still in active use for transportation as a car by defendant, and intestate was required to use it or to perform his work of shifting and moving cars with reference to it, and his work in that respect was affected and controlled by the presence and use by defendant of such defective car. In fact he was in a position to be, and was injured and killed only for that very reason.

The drawbar and draft timber and the coupling apparatus on the westerly end of the car as it stood at the time of the accident were gone. This was well known to defendant.

The train which intestate was, with his crew, operating, came into the station from the west, and stopped on number one track. The Farnham car stood next west of the defective car. The natural and usual way of getting the Farnham car would have been for the engine, then east of the siding, to

back on the siding from the east, after being detached from its train, and pull out both the out of order car and the Farnham car together that way, but owing to the fact that the coupler of the out of order car was broken down on the westerly end next to the Farnham car, the latter could not be pulled out in that way.

So intestate and his crew had to detach the engine from their train and move it, by another siding, around to the westerly end of the switch or siding on which the out of order car and the Farnham car stood, and pull the Farnham car out toward the west and then by the necessary process of kicking and side tracking attach it to the train (fols. 44, 45). In order to do this it was necessary to pull out five other cars which stood next to the west of the Farnham car on the same siding. Then of these six the Farnham car was attached to the way freight train. Two were left on another siding and the remaining three were kicked back onto the siding from which they were taken, in next to the out of order car which had not been moved. It was shown to be the customary and proper way when thus kicking cars in to be left on the siding, to couple them up to any other cars standing there, and this would have been done except for the defective coupler on the out of order car which rendered it impossible. So, when these three cars were kicked back intestate climbed upon the end of the car farthest in which would be moved up next to the out of order car, to operate the brakes. This was

the usual and proper thing to do. With proper equipment in the way of coupling this would have been unnecessary, and it would have been impossible for the car intestate was working on to come in close contact with the out of order car. There would have been a space of about two feet which would have rendered intestate's position perfectly safe. But with the coupler off the defective car, the contact, when the car intestate was riding came up, was complete so that anything between these cars would be crushed. It was the duty, of course, of intestate to operate the brakes, if he could, so as to stop the three cars right next to the out of order car where they were intended to be placed and left, and also so as to prevent a damaging collision between the cars which would, of course, have been serious to the cars themselves in the absence of the ordinary bumper which held them apart. In operating the brakes intestate was compelled to stand upon a step at the end and somewhat below the top of the car. For some reason, presumably because he was unable to stop the three cars in time with the brakes, there was a collision, which collision, however, would not have rendered intestate's position unsafe or inflicted any injuries upon him had the out of order car been equipped with couplers according to statutory requirements, but such statutory couplers being absent, the contact was complete and violent so that the leg of the intestate was crushed resulting in his death.

Further reference will be made to the evidence in discussing the following points:

POINT 1.

THE JUDGMENT ENTERED ON THE DECISION OF THE STATE COURT OF APPEALS REVERSING THE JUDGMENTS OF THE LOWER COURTS AND DISMISSING THE COMPLAINT, SHOULD BE REVERSED AND SET ASIDE AND THE VERDICT AND THE JUDGMENTS OF THE TRIAL COURT AND APPELLATE DIVISION OF THE STATE SUPREME COURT REINSTATED AND AFFIRMED BECAUSE SAID COURT OF APPEALS IS IN ERROR IN HOLDING:

1. That where the *injury* was proximately caused by a violation of the safety appliance act, there could be any other test of liability.

2. That the Federal Safety Appliance Acts were not intended for the protection of intestate in the work he was doing when killed.

3. That the Federal Safety Appliance Act

> "was not intended to provide a place of safety between colliding cars,"

when the work of the employee requires him, at the time, to be between such cars.

Plaintiff has the benefit of both the Safety Appliance and Federal Employers' Liability Acts. (San Antonio & S. R. Co., vs. Wagner, 241 U. S., 476, 36 S. C. R., 626.)

If the defective coupling contributed in *whole or in part* to the death of intestate, that is sufficient to establish absolute liability. Neither contributory negligence nor assumption of risk can avail defendant as a defense:

> Union Pacific R. R. Co. vs. Huxoll (245 U. S., 535; 38 S. C. R., 187).
>
> As said in the *Wagner case* (241 U. S., 476; 36 S. C. R., 626):
>
> "If this Act is violated, the question of negligence in the general sense, or want of care, is immaterial."

And in the

> *Parker case* (242 U. S., 56; 37 S. C. R., 69):
>
> "If there was evidence that the railroad failed to furnish such couplers, coupling automatically by impact, as the statute requires, nothing else need be considered."

See also

> Layton case, 243 U. S., 617 (37 S. C. R., 456).
>
> Otos case, 239 U. S., 349 (33 S. C. R., 124).
>
> Rigsby case, 241 U. S., 33 (33 S. C. R., 482).
>
> Delk vs. St. Louis S. F. R. Co., 220 U. S., 580 (31 S. C. R., 617).

In

> Spokane, etc., vs. Campbell (217 Fed., 524),

the Court said, in speaking of the Act:

> "The effect of this statute is to eliminate the element of proximate cause where the concurrent acts of the employer and the employee contribute as a cause of the injury or death of the employee, especially where the contributing act of the employer was in derogation of a duty imposed under the Act for the safety of the employee."

This is judicially declared in

> Grand Trunk Western Ry. Co. vs. Lindsay, (233 U. S., 42, 34, S. C. R., 581).

If, therefore, violation of this Act was a concurring proximate cause, that ends the case so far as defendant's liability is concerned, and no negligence on the part of intestate. (Section 3, Federal Employers' Liability Act; Great Northern Ry. Co. vs. Otos, 239 U. S., 349, 36 U. S., Sup. St. Rep.; Grand Trunk & Western R. Co. vs. Lindsay, 233 U. S., 42, 34 S. C. R., 581; Delk vs. St. L. S. F. R. Co., 220 U. S., 580, 31 Sup. Ct. Rep., 617), or assumption of any risk on his part, (Section 4, Employers' Liability Act; Section 8, Safety Appliance Act; Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S., 33; 36 Sup. Ct. Rep., 480; Schlemmer vs. B. R. & B. Ry.

Co., 220 U. S., 590, 31 S. C. R., 561), or any negligence on the part of defendant, or any employee of defendant (Texas & Pacific Ry Co. vs. Rigsby, supra; Delk vs. Ry. Co., supra; C. B. & Q. R. Co. vs. U. S., 220 U. S., 559; 31 Sup. Ct. Rep., 612; St. L. S. T. L. I. M. & S. R. Co., vs. Taylor, 210 U. S., 281, 28 S. C. R., 616) can avert or affect the liability of defendant. If the Act governs the case, the liability, by force of it, is absolute.

Errors of State Court of Appeals

There can be no contention here, but that the breaking down of the coupler on the out of order car in question was at least a concurring, proximate cause of intestate's death. It cannot be disputed that if the defective car had not been in use by defendant, intestate would not have been injured; or that if the statutory coupler had been on this car in working order, the car upon which intestate was engaged, with part of his body necessarily between the cars, in operating the brakes, would, when it was kicked against the defective car, have coupled automatically and been held apart for a distance of at least two feet by the automatic coupler, which would have prevented the accident, but that the absence of the automatic coupler caused a complete contact, for that reason, crushing intestate's leg and causing his death (fols. 44, 45, 54-60).

In the Layton case (234 U. S., 617; 37 Sup. Ct. Rep., 456), above referred to, this court said:

> "At the time the plaintiff was injured these Acts (Safety Appliance Acts) made it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not so equipped. By this legislation the qualified duty of the common carrier is expanded into an absolute duty in respect to car couplers, and if the *railroad companies used cars which do not comply with the standard thus prescribed, they have violated the plain prohibition of the law and there arose therewith a liability to make compensation to any employee who was injured because of it.*"

The defective car in the case at bar was not only so defective in violation of the statute (this is not disputed), *but was in use by the defendant* and was required to be used by intestate and he was injured because of it. The State Court failed utterly to give proper significance and effect to these facts which distinguish this case from the Conarty case (238 U. S., 243; 35 S. C. R., 785) relied upon by it. For in that case the out of order car was standing on an isolated switch waiting for repairs; out of commission, and out of use by the defendant. Nor was the injured employee required to use it or move it in any way, or have anything to do with it. The car upon which he was riding simply collided with it

while it was so standing out of use, laid up for repairs. This Court in that case said:

> "The deecased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car and were not intending or did not attempt *to couple the engine or to handle it in any way.* This movement was in the hands of others."

The deceased in that case was not engaged in any duty whatever at the moment of the injury, but simply riding on an engine to a place where he expected to be engaged in switching, which switching work, however, had nothing to do with the out of order car.

The point involved in the case at bar is this: Was the violation by defendant of the Safety Appliance Act in using a defective car with a broken down coupler the proximate cause of intestate's death? The position of defendant before the Court of Appeals was based entirely upon the contention that the *car was not in use by it.* The undisputed fact is otherwise. It appears that this defective car had arrived at Silver Creek, its destination, and where the accident happened, from Beaver Falls, Pennsylvania, on October 16, 1917, two weeks before the accident, loaded with steel (fols. 34-37) consigned to the Hunter Manufacturing Company at Silver Creek (fols. 38-42). It was in good condition when

it arrived (fols. 34-37), but in shifting it about in the yards while in use there, the drawbar had been pulled out and the coupler put out of commission (fols. 34-37). It was during the interval between the time of its arrival at Silver Creek and the accident, and also at the time of the accident, in process of being unloaded, in use in the transportation business of defendant, and, in the meantime, it had to be shifted about from one place to another on the sidings in getting unloaded and in order to permit the ordinary movements incident to the business of defendant which it employed intestate to do, to go on (fols. 38-42, 48-51). It had not been taken out of use or out of commission or laid up for repairs. The defendant was using it without the statutory coupler upon it and in violation of the Safety Appliance Act.

If the defendant had not so violated the Act, intestate would not have been injured. Therefore, it would seem to follow, obviously, that the violation was a proximate cause of the injury.

Intestate Was Within the Protection of the Act

In Louisville & Nashville Ry. Co. vs. Layton (243 U. S., 617; 37 Sup. Ct. Rep. 456), supra, this Court said:

"While it is undoubtedly true that the immediate occasion for passing the law requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between the cars to couple and uncouple them, yet, these laws, as written, are by no means confined in their terms to the protection of employees only when so engaged. The language of the Acts and the authorities we have cited, make it entirely clear that the liability in damages to employees for failure to comply with the law, *springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in or the work which he may be doing at the moment when he is injured.* This effect can be given to the Acts, and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of duty."

In that case plaintiff was a switchman in the employ of the railroad company. A train of cars standing on the switch was separated by about two car lengths from five other cars on the same track

loaded with coal. An engine pushing a stock car ahead of it came onto the switch and attempted to couple to said five cars but failed, striking them, however, with such force that although the engine with the stock car attached stopped within a car length, the five loaded cars were driven by the compact over the two intervening car lengths between the five cars and the train standing on the switch, and struck the train so violently that plaintiff who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track and injured. The failure to couple arose from lack of equipment with an automatic coupler of the car being pushed by the engine.

In Minneapolis & St. L. Ry. Co. vs. Gotschall (244 U. S., 66; 37 S. C. R., 598), intestate, a brakeman in the employ of the railroad, boarded a car toward the rear end of the train at a station and was proceeding along the tops of the cars toward the locomotive when the train started because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw intestate off the train and under the wheels, causing his death. He was not engaged in coupling cars but was simply pursuing his general employment as brakeman, at the moment walking on top of the train.

It would seem, from the above case, that this court had settled the controversy as to whether an employee, in order to come within the Safety Appli-

ance Act, must be engaged at the precise time in going between the cars to couple, or be engaged in coupling at all, and holds that an injury resulting from a defective coupler to any employee in whatever duties he may be engaged, and wherever he may be in the performance of his duties, comes within the Act.

The holding by the State court here that:

> "The Supreme Court said (referring to the Conarty case, 238 U. S. 243), that section two of the Act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. *It was not intended to provide a place of safety between colliding cars.* Therefore, when a collision was not the proximate result of the violation of these regulations where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the Act. *The absence of a coupler and draw-bar was not a breach of duty toward a servant* in that situation," (fol. 109),

is, therefore, unsound.

Intestate, in the case at bar, was engaged in the discharge of his duties as brakeman at the time. This duty involved the moving of cars, coupling and uncoupling them, and the very movement in which

he was engaged and the presence of part of his body between the cars, and which resulted in his death on account of the defective coupler. The car with the defective coupler was not withdrawn from business but was still in use at the time of the accident (fols. 34, 42, 48-51).

The State Court made the test of liability the proximate cause of the *collision*. This is not the test. But rather, was the violation of the Safety Appliance Act the proximate cause of *intestate's death?* As said in the Layton case:

> "Carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of *injury* to them when engaged in the discharge of duty."

However, it can as well be said that the violation of the Act by defendant was the proximate cause of the so-called collision for there would have been no collision, at least such as occurred, if the statutory coupler had been on in proper condition. It was the absence of the coupler, the violation of the Act, which made possible the collision which killed intestate. The cars might have otherwise bumped against each other but with no harm to intestate because the couplers would have kept the cars apart two feet and intestate's legs would not have been crushed.

But there was no collision in the true sense of the term, merely the usual bumping together in the shifting about of cars. There was a *close contact* when the cars came together which *close* contact resulted in intestate's death, and which occurred because of the violation of the Acts by defendant.

Judge Andrews for the Court of Appeals, said:

> "It was plain that had the coupler and draw-bar been present, the two cars would have been held so far apart that he (intestate) would have escaped injury."

The question as to what caused the cars to bump against each other has nothing to do with the case.

It was: (1) *the unlawful use by defendant of a legally defective car that caused intestate's death*, and (2), immediately and specifically, *the close contact caused by the unlawful defect.*

If the Court of Appeals had the right to construe the statute in the light of the Conarty case alone, where the Supreme Court said:

> "The risk in coupling and uncoupling was the evil sought to be remedied,"

and again:

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between col-

> liding cars. On the contrary, they affirmatively show that the principal purpose in their enactment was to obviate the necessity of men going between the ends of the cars,"

then, in the narrowest and most illiberal view possible, it might be held that, as the deceased was not coupling or uncoupling or going between the cars for that purpose, the Act was not applicable. But the Supreme Court, evidently anticipating that such a narrow construction might be put on the Conarty case, has since expressly said in the Layton case that the responsibility is not determined

> "from the position the employee may be in or the work which he may be doing at the moment when he is injured."

When the State Court says that couplers were not required so that they might act as bumpers, it indicates an indisposition to apply the simple rule of the Layton case, viz., Was there a violation, and was such violation the proximate cause *of the injury?*

Should it be necessary to further distinguish this case from the Conarty case, attention is respectfully invited to the following:

In the Conarty case, Judge VanDeVenter has pointed out, first:

> "The deceased and his co-employees with the switch engine were on their way to do some switching at a point some distance beyond the car, and were not intending and did not intend *to couple it to the engine or handle it in any way.* This movement was in the hands of others."

The car in that case, also, was out of use.

In the case at bar the very movement in which the plaintiff's intestate met his death arose from the fact that defendant *was using* the out of order car in violation of the statute and was required by reason of his inability to handle the defective car in the usual way because of the defect.

Again, Judge VanDeventer in the Conarty case, says:

> "We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car, or handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and draw-bar operated as a breach of duty imposed for his benefit."

But, as was pointed out, the deceased in the case at bar was charged with the duty of placing the car on which he was riding as close to the defective car as possible, and in guarding against any damaging collision between the cars (fols. 26, 48), was making

the movement in a different manner than usual because of the defective car, and at the very time of the accident was required to be at a point of danger to prevent a collision with the defective car, which would be damaging to property because of the defect and which would have been harmless without it (fols. 61-63).

Since the Supreme Court has written in the *Layton* and *Gotschall* cases, employees who are not engaged in coupling or uncoupling, or handling defective cars in any way are under the protection of the Act.

Therefore, the State Court was wrong in saying:

> "It was not intended to provide a place of safety between colliding cars."

That contention was not made by the defendant before the Court of Appeals. This misconception originated with that court. Intestate in performing his duties had part of his body, his leg, between the cars as they came together. The collision occurred, doubtless, because he could not stop the three cars he was riding, which were being shunted in on the switch to be left there next to the out of order car, in time to prevent the cars coming together. If defendant had not been unlawfully using this defective car in violation of the Safety Appliance Act, of course, the injury would not have occurred. Or, in another way, if the car had had a lawful coupler on, while the collision, so-called, might have

occurred, being only such a collision as is incident to all car movements in yards, there would have been no close contact and intestate would not have been crushed. It follows very obviously that the Act was intended to provide a safe place between the cars, and if, in case of a collision or such coming together as is incident and usual in the movement of cars in yards occurs, and the employee is between the cars in the doing of his duty, then it must be said that the Act was intended to provide a safe place between colliding cars. In truth, that is just what the Act was intended for, that is, the colliding of cars, as in this case, incident and usual in the movement and switching about and coupling of them in yards or on sidings.

In the case of New York Central Railroad Co. vs. Kimball, the employee, a brakeman, went in between cars, one of them having a defective coupler. The cars were pushed together by the engine and he was crushed because the defective coupler permitted a close contact. The employee recovered; the case went all through the New York courts and was affirmed by the Court of Appeals, 223 N. Y., 711, and an application for a writ of certiorari denied by this Court, 248 U. S., 572.

These actions for violations of the Safety Appliance Act are generally brought in the State Courts. Many such actions are brought in the State of New York. This State is within the Second Judicial Circuit.

It is respectfully submitted that the decision in the Lang case is not only in flat contradiction of the principles laid down in the Layton case and the Gotschall case, but is specifically in conflict with the case of

Erie vs. Russell, 183 Fed. Reporter, 724 (Second Circuit).

In that case plaintiff was repairing a defective coupler. One of the other cars was pushed into the car having the defective coupler, which resulted in injury to the plaintiff. The plaintiff was not engaged in coupling or uncoupling, or in handling the car in any way, except that he was repairing the defective coupler. The Court said:

> "The second question of importance in the case is whether the Trial Court properly submitted to the jury the question whether the presence of the defective coupler was a proximate cause of the accident. It is urged with much force that that which caused the injury to the plaintiff's intestate was the unexpected movement of the three cars—an act unrelated to, and independent of, the act of repairing the coupler. Indeed, were the question to be decided free of authority, a majority of the court would have difficulty in holding that the repair of the coupler was a part of a coupling operation, and bore such a relation to the

> impact of the cars that the necessity for such repairs was an efficient cause of the accident. But still the reason why Russell went to the place where he was injured was the defective coupler, and if he had not gone there the accident would not have occurred."

In the Sixth Circuit in the case of

> Erie R. Co. vs. Schleenbaker, 257 Fed., 667,

the Court has gone even further. The defective car was placed at the back end of a train, and because of this the lights were removed from the caboose to the rear end of the defective car. The removal of these lights caused the conductor of the train to lose his footing and receive the injuries complained of. The Court affirmed a judgment for the plaintiff which determined that the defective coupler was the proximate cause of the conditions which followed.

The Circuit Court of Appeals in the Second Circuit has recently had this question before it in the case of Director General of Railroads vs. Ronald, 265 Fed., 143. In a concurring opinion Circuit Judge Manton says:

> "The defendant below argues that the Safety Appliance Act has no application to the case at bar for the reason that the

plaintiff below was not engaged in coupling or uncoupling cars when he was injured. * * * The legislation was clearly for the safety of employees. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in light of the automatic coupling requirements statute, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. The Supreme Court has placed no such construction upon these statutes when it has had occasion in the past to refer to them.

"In Louisville & Nashville R. Co. vs. Layton, 243 U. S., 617; 37 Sup. Ct. Rep. 456; 61 L. Ed., 931, the Court held that the purpose of the Safety Appliance Act was to promote the safety of employees and ruled that it was unlawful for any carrier engaged in interstate commerce to use on its railroad cars not so equipped. Southern R. Co. vs. U. S., 222 U. S., 20, 32 Sup. Ct. 2, 56 L. Ed., 72. The Court there said:

" 'The language of the Acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful *to*

> *use cars* not equipped as required—not from the position the employee may be in or the work wihch he may be doing at the moment when he is injured. This effect can be given to the Acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause *of injury* to them when engaged in the discharge of duty.'
>
> "This positive duty upon the carrier to comply with the statute was recently announced and held to apply where an employee was not engaged in coupling or uncoupling cars, and where it appeared that he was injured because of the failure an an automatic coupler to perform its function. S. R. R. Co. vs. Railroad Commission, 236 U. S., 439, 35 Sup. Ct. 304, 59 L. Ed., 661."

It would, therefore, appear that if a plaintiff brings an action in the Federal Court in the State of New York, the rule of the Russel and Ronald cases will apply. If he brings the action in the State Court, the rule of the Lang case will apply. Of course, a different construction of a Federal statute by the State and Federal Courts in the same jurisdiction which construction leads to pre-

cisely opposite results in the adjustment of the rights of the parties cannot be permitted. The Federal rule must prevail.

It follows from what has already been said, and from the authorities cited in this Court, that when a railroad company uses a car with a defective coupler, that is a violation of the Safety Appliance Acts, and if an injury to an employee is attributable to such defect, such violation is a proximate cause of his injury, even if his injury is caused by the collision or coming together of cars.

POINT II.

THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK SHOULD BE REVERSED AND THE JUDGMENTS OF THE TRIAL COURT AND APPELLATE DIVISION OF THE SUPREME COURT OF THAT STATE REINSTATED AND AFFIRMED.

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